**BEFORE THE APPEALS BOARD**
**FOR THE**
**KANSAS DIVISION OF WORKERS COMPENSATION**

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| **DONNA K. HANNA** | ) | |
| Claimant | ) | |
| | ) | |
| VS. | ) | |
| | ) | |
| **NEODESHA PLASTICS, INC.** | ) | |
| Respondent | ) | Docket No. 1,033,337 |
| | ) | |
| AND | ) | |
| | ) | |
| **TWIN CITY FIRE INSURANCE CO.** | ) | |
| Insurance Carrier | ) | |

## ORDER

Claimant requested review of the February 16, 2009 Award by Administrative Law Judge (ALJ) Thomas Klein. The Board heard oral argument on June 24, 2009.

### APPEARANCES

William L. Phalen, of Pittsburg, Kansas, appeared for the claimant. Anemarie Mura, of Overland Park, Kansas, appeared for respondent and its insurance carrier (respondent).

### RECORD AND STIPULATIONS

The Board has considered the record and adopted the stipulations listed in the Award. At oral argument the parties agreed that in the event the dispositive issue of notice was resolved in claimant's favor, claimant was then entitled to an Order for temporary total disability benefits for the period April 25, 2006 to May 16, 2006 at the stipulated rate of $418.44 and payment of the outstanding medical bills associated with claimant's care in this matter. The parties further agreed that the Board should decide the issues not reached by the ALJ rather than remand the matter to the ALJ for a determination of those issues.

## ISSUES

The ALJ concluded the claimant's hernia was caused by an accident arising out of and in the course of her employment with respondent. He went on to find that she did not, however, provide proper notice of this accident as required by K.S.A. 44-520 and therefore the ALJ denied compensation.

The claimant requests review of the ALJ's Award. Claimant contends that she provided notice of her work-related accident to both her direct supervisor and the HR Director. Accordingly, the claimant maintains the ALJ's Award should be reversed and an order entered granting her temporary total disability benefits, payment of medical bills, future medical treatment and a 6 percent whole body permanent partial impairment which reflects Dr. Murati's diagnosis of hypogastric causalgia, a complication of her hernia and the resulting surgery.

Respondent argues that the ALJ should be affirmed in all respects.

## FINDINGS OF FACT AND CONCLUSIONS OF LAW

Having reviewed the evidentiary record filed herein, the stipulations of the parties, and having considered the parties' briefs and oral arguments, the Board makes the following findings of fact and conclusions of law:

Claimant is employed as a laborer who grinds parts which are ultimately used in truck bed liners. This job requires claimant to routinely bend over to pick up a part, grind and manipulate the part and filling a box with the completed parts. The boxes, which can weigh as much as 50 pounds, are then placed on a pallet and moved with a hand jack to another area. In late March or early April 2006, claimant began to notice problems with pain in her abdomen and left leg.

According to claimant, she told her working supervisor, Linda McMurray, that she was hurting herself at work. In fact, claimant testified that when Linda asked her to work overtime, claimant refused, making it clear to Linda that the pain she was experiencing while working precluded her from working any overtime.[1]

Claimant also testified that she informed Chris Tinsley, the HR Director, that she had hurt herself while working.[2] Claimant told Mr. Tinsley that she believed she had a hernia and was going to see Dr. Bradley Barrett. Dr. Barrett was claimant's personal physician and also served as the medical provider for respondent. This notification to Mr. Tinsley

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[1] R.H. Trans. at 16.

[2] *Id.* at 17.

came a few days before April 10, 2006, the first time claimant sought medical treatment for this condition. Mr. Tinsley voiced no objection to claimant's plan to seek treatment, but no accident form was filled out at this point. Indeed, Mr. Tinsley says he does not remember claimant informing him of any sort of accident in connection to her hernia. Although he acknowledges claimant is an honest and trustworthy person and if she says something "he'd believe her"[3], he maintains that he was never aware of a work-related accident until the formal claim was filed on February 26, 2007.[4] Had he been told of an accident, he would have referred claimant to Dr. Barrett for an evaluation and a drug screen would have been requested. And the appropriate paperwork would have been completed. Mr. Tinsley concedes that he might have misunderstood claimant's statements once with respect to a work-related accident, but if she had told him more than once, he most certainly would have taken appropriate steps with respect to a claim.[5]

K.S.A. 44-520 states:

> Except as otherwise provided in this section, proceedings for compensation under the workers compensation act shall not be maintainable unless notice of the accident, stating the time and place and particulars thereof, and the name and address of the person injured, is given to the employer within 10 days after the date of the accident, except that actual knowledge of the accident by the employer or the employer's duly authorized agent shall render the giving of such notice unnecessary. The ten-day notice provided in this section shall not bar any proceeding for compensation under the workers compensation act if the claimant shows that a failure to notify under this section was due to just cause, except that in no event shall such a proceeding for compensation be maintained unless the notice required by this section is given to the employer within 75 days after the date of the accident unless (a) actual knowledge of the accident by the employer or the employer's duly authorized agent renders the giving of such notice unnecessary as provided in this section, (b) the employer was unavailable to receive such notice as provided in this section, or (c) the employee was physically unable to give such notice.

The ALJ denied claimant's claim as he concluded she had failed to give timely notice of her accident. The ALJ offered the following explanation for his ruling:

> The [c]laimant testified that she told her working supervisor, Linda McMurray and Chris Tinsley the HR director with the [r]espondent. During the time the [c]laimant alleges a work accident, her personal physician, Dr. Barrett [,] was also

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[3] *Id.* at 41.

[4] The Division's file indicates that a claim for workers compensation benefits was served upon respondent by claimant on February 26, 2007.

[5] R.H. Trans. at 42.

> used as the [r]espondent's company physician. (Barrett Depo., p 3) Dr. Barrett did not treat the [c]laimant's condition as a workers compensation injury. (Barrett at 4) Mr. Tinsley testified that the [c]laimant told him that she had medical issues and scheduled her remaining vacation pay beginning April 24, 2006 and then took medical leave. These actions on the part of the [c]laimant indicate that she did not report her injury as a work accident. The Court finds that the [c]laimant did not provide proper notice and her claim is denied on that basis.[6]

The Board has considered the entire record and finds the ALJ's Award should be reversed. While the ALJ's conclusion that the circumstantial evidence suggests that claimant did not report her injury as a work accident is understandable, it remains uncontroverted that claimant told her working supervisor, Ms. McMurray, that she was injured at work. Ms. McMurray did not testify to dispel this assertion. Uncontroverted evidence that is not improbable or unreasonable cannot be disregarded unless it is shown to be untrustworthy, and is ordinarily regarded as conclusive.[7] Although respondent attempted to impair claimant's credibility on this issue by arguing that claimant's previous deposition testimony failed to include Ms. McMurray as one of the individuals who claimant told of her injury, the record does not include this deposition testimony. Thus, it is difficult to accept respondent's argument. It may well be that claimant merely attempted to answer the questioned posed and withheld nothing. The questioning went as follows:

> Q. [by Ms. Mura] Now you remember I took your deposition back, let's see, this was March 14, 2008. Do you remember that?
> A. Yes.
> Q. And at that time you never told me about Linda McMurray, did you?
> A. No.
> Q. In fact, when I asked you if you reported any doctor taking you off work, you only told me you reported it to Chris Tinsley, didn't you?
> A. Yes.[8]

Even Mr. Tinsley does not rule out the possibility that claimant advised him of her work-related injury. He painted claimant as a valued and trustworthy employee, one who was believable. Moreover, there is circumstantial evidence within Dr. Barrett's file that suggests that claimant did assert her hernia was caused by work. Dr. Barrett's file includes a form normally completed and filed by the authorized treating physicians when treating work-related injuries. This form was half way completed on May 15, 2006, just before claimant was referred to a surgeon for evaluation of her hernia complaints and there was a handwritten note requesting workers compensation approval. Although Dr. Barrett was unable to testify as to the reasons why this form was started or why it was not completed,

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[6] ALJ Award (Feb. 16, 2009) at 3.

[7] *Demars v. Rickel Manufacturing Corporation*, 223 Kan. 374, 573 P.2d 1036 (1978)

[8] R.H. Trans. at 27-28.

apparently someone within Dr. Barrett's office believed claimant's injury *might* have been work-related as the form was retrieved and partially completed.

For these reasons, the Board finds that claimant did establish timely notice as required by K.S.A. 44-520. Claimant testified that her problems began in late March, early April of 2006 and continued each and every day up to surgery. She notified Mr. Tinsley a few days before her April 10, 2006 medical examination. She also notified Ms. McMurray during this same time period (although the dates of those notifications is not found within the record). Nonetheless, the bulk of the evidence is persuasive on this issue and supports claimant's contention that she provided timely notice to respondent of her work-related accident.

Having concluded that claimant's notice is timely, the Board must consider the nature and extent of claimant's permanent impairment.[9] Claimant was evaluated by Dr. Pedro Murati, at her lawyer's request, on two separate occasions. He diagnosed her with post bilateral inguinal hernias with hypogastric neuropathies. He explained that hypogastric neuropathy is a common complication of hernia surgery. It occurs when a nerve becomes trapped and thereby causes pain. According to Dr. Murati, claimant's condition is ratable under Table 24 (p. 52) of the *Guides*[10] and she bears a 6 percent permanent partial impairment to the whole body for her ongoing complaints of pain due to the hypogastric neuropathy.

Respondent asked Dr. Eden Wheeler to examine claimant and following her review of the records and an evaluation, she concluded that although claimant expresses a number of physical complaints, none of those problems are due to a work-related injury. Thus, she rated claimant with a 0 percent permanent partial impairment. In her opinion claimant did not bear any evidence of hypogastric neuropathy.

The Board has carefully considered the medical testimony and finds, under these facts and circumstances that Dr. Murati's opinions are more persuasive. Claimant continues to require ongoing medications in order to continue her work activities. Her complaints of low back pain and radiating pain are credible. Accordingly, she is also entitled to ongoing medical treatment. Thus, respondent should designate a physician to oversee claimant's continued need for medications.

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[9] As noted earlier, the parties agreed that if the issue of notice was resolved in claimant's favor, the issues of temporary total disability and medical benefits were conceded. The only remaining issue is the nature and extent of claimant's permanent impairment.

[10] American Medical Ass'n, *Guides to the Evaluation of Permanent Impairment*, (4th ed.). All references are to the 4th ed. of the *Guides* unless otherwise noted.

## AWARD

**WHEREFORE**, it is the finding, decision and order of the Board that the Award of Administrative Law Judge Thomas Klein dated February 16, 2009, is reversed on the issue of notice and claimant is entitled to an Award against respondent as follows:

The claimant is entitled to 3.14 weeks of temporary total disability compensation at the rate of $418.44 per week or $1,313.90 followed by 24.90 weeks of permanent partial disability compensation at the rate of $418.44 per week or $10,419.16 for a 6 percent work disability, making a total award of $11,733.06.

As of July 15, 2009 there would be due and owing to the claimant 3.14 weeks of temporary total disability compensation at the rate of $418.44 per week in the sum of $1,313.90 plus 24.90 weeks of permanent partial disability compensation at the rate of $418.44 per week in the sum of $10,419.16 for a total due and owing of $11,733.06, which is ordered paid in one lump sum less amounts previously paid.

Claimant is also entitled to ongoing medical treatment and respondent is ordered to designate a physician to oversee claimant's continued need for medications.

**IT IS SO ORDERED.**

Dated this _____ day of July 2009.

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BOARD MEMBER

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BOARD MEMBER

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BOARD MEMBER

c: William L. Phalen, Attorney for Claimant
Anemarie D. Mura, Attorney for Respondent and its Insurance Carrier
Thomas Klein, Administrative Law Judge